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R. ROBERT SEAYER, CLERK

**In the Supreme Court**  
OF THE  
**United States**

OCTOBER TERM, 1971

No. **71-732**

**MERLE R. SCHNECKLOTH, *Petitioner***

**VS.**

**ROBERT CLYDE BUSTAMONTE, *Respondent***

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**PETITION FOR A WRIT OF CERTIORARI**  
**to the United States Court of Appeals**  
**for the Ninth Circuit**

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**RESPONSE NOT PREPARED**



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**PETITION FOR A WRIT OF CERTIORARI  
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Petitioner, Merle R. Schneckloth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 13, 1971.

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## **OPINIONS BELOW**

The opinion of the Court of Appeals, as yet unreported, is appended hereto as "Appendix A." The opinion of the United States District Court for the Northern District of California, also unreported, is

appended hereto as "Appendix B." The opinion of the California Court of Appeal is reported at 270 Cal.App.2d 648, 76 Cal.Rptr. 17.

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### **JURISDICTION**

The judgment of the United States Court of Appeals for the Ninth Circuit was filed September 13, 1971. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

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### **QUESTIONS PRESENTED**

1. Whether the Court of Appeals erred in holding invalid a search based upon a verbal expression of consent in an atmosphere free from coercion, on the sole ground that the state failed to demonstrate that the consent was given with knowledge that it could be withheld.

2. Whether questions of search and seizure should be available to a state prisoner seeking to set aside a final conviction on federal habeas corpus.

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### **STATEMENT OF THE CASE**

#### **A. Proceedings in the State Courts**

The District Attorney of Santa Clara County filed an information on February 24, 1967, accusing appellant Robert Clyde Bustamonte of receiving stolen property, in violation of California Penal Code sec-

tion 496, and possessing a complete check with intent to defraud, in violation of California Penal Code section 475(a).

Appellant was arraigned in the Santa Clara County Superior Court and pleaded not guilty on March 3, 1967. Jury trial commenced on April 5, 1967. On April 12, 1967, the jury convicted appellant of possession of a completed check with intent to defraud, but reached no verdict on the charge of possession of stolen property. The trial court thereafter declared a mistrial as to the latter charge. Appellant was sentenced to prison for the term prescribed by law on April 21, 1967.

Appellant filed notice of appeal on April 27, 1967. The judgment of conviction was affirmed by the Court of Appeal of the State of California, First Appellate District, Division One, in an opinion published at 270 Cal.App.2d 648, 76 Cal.Rptr. 17 (1969).

On May 8, 1969, the California Supreme Court denied without opinion appellant's petition for a hearing.

#### **B. Proceedings in the Federal Courts**

On May 23, 1969, Bustamonte petitioned the District Court for a writ of habeas corpus. The petition was filed on February 10, 1970. The District Court's order granting appellant's motion to file in forma pauperis and denying his petition was filed on February 10, 1970.

Appellant filed notice of appeal on March 9, 1970. On that date, the District Court certified that there

was probable cause to appeal and granted leave to proceed without prepayment of cost.

On September 13, 1971, the Court of Appeals filed its opinion vacating the order of the District Court denying the writ and remanding the matter for further proceedings.

### **C. Statement of the Facts**

The facts of this case are recited in the opinion of the California Court of Appeal, 270 Cal.App.2d at 650-651, 76 Cal.Rptr. at 18-19:

"On the morning of January 19, 1967, Charles Kehoe, owner of the Speedway Car Wash in Mountain View, discovered that the business office had been burglarized some time since he had closed on the previous day. A check-writing machine, known as a check protector, and a number of blank checks had been removed from the office.

"On January 21, 1967, Joe Gonzales and Joe Alcalá went with defendant to the Food Fair Market in Mountain View. According to the testimony of Gonzales, defendant filled out a check while they were in the parking lot. This check was a Speedway Car Wash check 'protectorized' in the amount of \$63.75 and defendant made it out to a 'Joe Garcia' and signed it with Kehoe's name. Gonzales took the check into the market where he cashed it in the process of buying a carton of cigarettes. Kehoe identified the check payable to Garcia and stated the signature was not his. After cashing the check on January 21, defendant, Gonzales and Alcalá went to defendant's home, Gonzales saw defendant and Alcalá lean over the

open trunk of defendant's parked Oldsmobile automobile and then the two returned to the truck where Gonzales was waiting, bringing with them two additional Speedway Car Wash blank checks. The amounts of money were filled in on the checks but no names or signatures were entered. The men next unsuccessfully attempted to cash another check at the Blue Bonnett Bar in Sunnyvale.

"Gonzales testified that at some time before the incidents of January 21 defendant had shown him the check protector and some blank checks which were contained in the trunk of a Camaro automobile which had been rented by defendant.

"On January 31, 1967, defendant, Alcalá and Gonzales went to San Jose to find persons willing to use false identification for the purpose of cashing checks. At about 11 p.m. they picked up three other men. Attempts to cash checks at grocery stores and a bar were futile. During the evening they stopped at the Moonlite Shopping Center where Gonzales saw defendant take some checks from defendant's Renault automobile which was in the parking lot.

"Police Officer James Rand of the Sunnyvale Department of Public Safety was in a police vehicle alone on routine patrol at approximately 2:40 a.m. on January 31, 1967. He observed an oncoming vehicle which had only one functioning headlight. Rand made a U-turn and also observed that the automobile in question did not have an automobile license plate light. He stopped the automobile which was a black 1958 Ford 4-door sedan. Six men were in the automobile at the time it was stopped, and Rand testified that

defendant was in the front seat along with Alcala, and that Gonzales was driving. After Gonzales failed to produce a driver's license, Officer Rand asked if any of the occupants of the Ford had identification. Only Alcala produced a driver's license and he indicated that the automobile belonged to his brother. Officer Rand asked the occupants to step out of the automobile. After the men were out of the car and after Officer Rand was joined by Officer Bissell and Captain Crabtree, he asked Alcala if he could search the car. According to Officer Rand's testimony, Alcala replied 'Sure, go ahead.' Gonzales also testified that Alcala had given permission for the search and had actually aided the officers. Officer Rand and Captain Crabtree searched the Ford. Wadded up under the left rear seat they found three checks. Each of the checks was 'protectorized' in the amount of \$67.34, each was signed with the name of Kehoe as maker, and each was a Speedway Car Wash check. One was payable to Robert Gomez and two were payable to Jino Anthony.

"Later, pursuant to a search warrant, the Renault at the Moonlite Shopping Center and defendant's Oldsmobile in Sunnyvale were searched. Two checks were found in the Renault and the check protector and several blank checks were found in the Oldsmobile, along with a number of traffic citations naming defendant. A criminologist testified that in his opinion the writing on the Speedway Car Wash checks was the writing of defendant."

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit is out of harmony with decisions of this Court, the other circuits and the California courts. California courts hold that the determination in a particular case of whether an apparent consent was in fact voluntary is a question of fact to be determined in the light of all the circumstances. They do not require specific affirmative proof that the person searched knew that he had a right to refuse consent. This is a reasonable rule and it has been sanctioned by this Court's decision in *Bumper v. North Carolina*, 391 U.S. 543 (1968). As a constitutionally acceptable standard, California's consent rule must be applied to state prisoners in federal habeas corpus proceedings. *Ker v. California*, 374 U.S. 23 (1963). Only an authoritative decision by this Court can restore harmony within our federal system.

Moreover, this case presents this Court with an opportunity to reconsider its recent decision in *Kaufman v. United States*, 394 U.S. 217 (1969), and to hold that questions of search and seizures are not appropriately raised on collateral attack.

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## ARGUMENT

### I

THE FORD IN WHICH BUSTAMONTE WAS RIDING WAS SEARCHED PURSUANT TO A VALID CONSENT AND THE COURT OF APPEALS ERRED IN HOLDING OTHERWISE

Bustamonte failed to persuade the California trial court, intermediate appellate court and Supreme

Court that the consent to search the car in which he was riding was invalid. He also failed to persuade the United States District Court. However, his persistence was eventually rewarded when he persuaded the Court of Appeals to evaluate his claim of invalid consent in the light of the more rigorous federal standard. See comment, 10 Santa Clara Lawyer, 205, 207 (1969). Previous decisions of the Ninth Circuit overturning state trial and appellate courts on consensual search questions have encouraged such forum shopping expeditions. See, e.g., *Cunningham v. Heinze*, 352 F.2d 1, 3 (9th Cir. 1965); *Oliver v. Amiotte*, 382 F.2d 987 (9th Cir. 1967); *Oliver v. Bowens*, 386 F.2d 688 (9th Cir. 1967). Cf. *State of Montana v. Tomich*, 332 F.2d 987, 990 (9th Cir. 1964).

In applying the exclusionary rule, "the contrast between the federal and California approaches is sharpest in the area of searches by consent." Manwaring, *California and the Fourth Amendment*, 16 Stan.L.Rev. 318, 334-35 (1964). This divergence results from the fact that California courts test consensual searches by a standard different from that applied by the Ninth Circuit. California examines consensual searches in light of the standard articulated by former Chief Justice Traynor in *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852, 854 (1955):

"Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is question of fact to be determined in the light of all the circumstances."

*Accord, Castaneda v. Superior Court*, 59 Cal.2d 439, 30 Cal.Rptr. 1 (1963); *People v. Smith*, 63 Cal.2d 779, 48 Cal.Rptr. 382 (1966); *People v. Johnson*, 68 Cal.2d 629, 68 Cal.Rptr. 441 (1968).

California courts focus their inquiry on whether the consent was truly voluntary. The consenting party's knowledge and understanding of his Fourth Amendment rights are relevant only to the extent that they evidence coercion or noncoercion. See *People v. Wilson*, 145 Cal.App.2d 1, 301 P.2d 974 (1956), limited in *People v. Linke*, 265 Cal.App.2d 297, 71 Cal.Rptr. 371 (1968); Comment, 10 Santa Clara Lawyer 205, 211 (1969).

The theory underlying the California rule is this: the Fourth Amendment proscribes only unreasonable searches and seizures; when consent is uncoerced, law enforcement officers have acted reasonably within the meaning of the Fourth Amendment and the search is valid. *People v. Michael*, *supra*, 45 Cal.2d at 753, 290 P.2d at 854. This view has led our courts to concentrate on the objective manifestations of consent.

The Ninth Circuit has adopted a basically different approach. Inquiry has centered on the consenting party's subjective state of mind: has he intentionally relinquished a known right or privilege? *Cipres v. United States*, 343 F.2d 95, 97-98 (9th Cir. 1965), criticized in *People v. Cirilli*, 265 Cal.App.2d 607, 611, 71 Cal.Rptr. 604, 607 (1968). This is the standard for waiver announced in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Its effect is to require of police officers clairvoyance or psychological insight equal to that of

reviewing courts. See *Robbins v. MacKenzie*, 364 F.2d 45, 49 (1st Cir. 1966).

Although consent is not equated with waiver in California courts, Comment, 10 Santa Clara Lawyer, *supra*, at 211, nor in all federal courts, Comment, 67 Col.L.Rev. 130, 132 (1967), the Ninth Circuit has applied its test in federal habeas corpus proceedings involving state prisoners. See, *e.g.*, *Oliver v. Amiotte*, *supra*; *Oliver v. Bowens*, *supra*. We cannot reconcile this practice with the declaration by this Court in *Ker v. California*, 374 U.S. 23, 24 (1963), that "The States are not precluded from developing workable rules governing arrests, searches and seizures." The California rule, reflecting the traditional approach to voluntariness, is the test applied by North Carolina and was impliedly approved by this Court in *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968):

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." See also Note 6 Calif. Western L. Rev. 216 (1970).

In an analogous situation, involving a wife's handing over items of physical evidence which incriminated her husband, this Court applied the same test, *i.e.*, were the wife's actions voluntary, *i.e.*, the product of her own free will, as opposed to a response to an assertion of official authority. *Coolidge v. New Hampshire*, 403 U.S. 443, 445, 489 (1971).

As the California consent rule is a constitutionally acceptable standard, it must be applied to state prisoners in federal habeas corpus proceedings. We ask this Court to reaffirm that "*Mapp* sounded no death knell for our federalism. . . ." *Ker v. California*, *supra*, at 31 (opinion of Mr. Justice Clark).

California courts uniformly hold that whether an apparent consent to search was in fact voluntarily given or was in submission to asserted authority is a question of fact. *People v. Michael*, *supra*; *People v. Shelton*, 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964). Consent is also seen as a factual question by this Court, *United States v. Mitchell*, 322 U.S. 65 (1944); *Davis v. United States*, 328 U.S. 582 (1946).

Title 28, United States Code section 2254(d) declares that unless the State court hearing was unfair or defective in specified respects,

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a *factual* issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct. . . .*" (Emphasis supplied.)

The state trial court made a factual finding that appellant's consent was voluntary. That determination was affirmed on appeal. Bustamonte received a full

and fair hearing at the trial and appellate court levels. The State court finding is entitled to the presumption authorized by Title 28, United States Code section 2254(d). Since, under *Bumper*, voluntariness is a constitutionally acceptable test, and since the petition does not allege that the State court hearings were in any respect inadequate, the claim of invalid consent should have been summarily rejected.

The Ninth Circuit, however, erroneously imposed upon the state its own waiver rule, essentially a questionable extension of *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the *Miranda* admonition was required in the context of custodial interrogation in part because the questions of the police themselves imparted a right to a reply. However, "the mere asking of permission to . . . make a search carries with it the implication that the person can withhold permission. . . ." *People v. Chaddock*, 249 Cal.App.2d 483, 485-86, 57 Cal.Rptr. 582 (1967).

Warnings required before *custodial* interrogation are intended to eliminate conditions conducive to coercion, "to sterilize the police antechamber." *In re Lopez*, 62 Cal.2d 368, 374, 42 Cal.Rptr. 188, 192 (1965), cf. *Miranda v. Arizona*, *supra*, at 478 n. 46. Consents to search, however, are generally given at the suspect's residence, automobile, or some other public place. Where consent to search is obtained at police headquarters, the prosecution must overcome a strong presumption of invalidity. See, e.g., *Channel v. United States*, 285 F.2d 217 (9th Cir. 1960); *People v. Shelton*, 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964). The state

and federal tests for consent are sufficiently sensitive to exclude evidence secured by coercive police conduct.

Coercion during police interrogation raises a danger of producing unreliable self-incriminating evidence. "[T]he rules governing searches are concerned not with the exclusion of unreliable evidence. . . ." *Gorman v. United States*, 380 F.2d 158, 164 (1st Cir. 1967).

**The consent was voluntarily given.**

When the police stopped the 1958 Ford, Gonzales was driving; appellant was seated in the front with Alcala; three men occupied the rear seat. Officer Rand requested the six occupants to step out of the automobile after Gonzales failed to produce a driver's license and only Alcala could furnish identification. Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead," according to Rand. Gonzales testified that Alcala consented freely, even casually, and actually aided the officers. The officers' search uncovered three checks under the left rear seat.

This is not a case where a party consented to a search knowing that it was likely to disclose evidence which would incriminate him. Alcala, not Bustamonte, consented to the search. As Alcala was in the front seat he could hardly know that his companions were hiding checks under the rear seat. There is no basis here for a presumption of coercion on the theory that "no sane man who denies his guilt would actually be willing that policemen search . . . for contraband

which is certain to be discovered." *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954);<sup>1</sup> *Coolidge v. New Hampshire*, *supra*.

The early hour cannot be considered a coercive factor. *Cf. People v. Kennedy*, 256 Cal.App.2d 755, 64 Cal.Rptr. 345 (1967) (2:00 a.m.). The road where the stop was effected was peopled with twice as many suspects as officers. Since Bustamonte and his friends outnumbered the police six to three, the number of officers could hardly be coercive. The occupants of the Ford were not "questioned" regarding any crime, but merely asked to furnish a driver's license or identification. The traffic citation was issued to Gonzales, not to Alcala.

Here there was no "dramatic excitement of drawn guns," or arrest preceding consent. *Wren v. United States*, 352 F.2d 617, 619 (10th Cir. 1965). "The circumstances of the investigation by the police presents [sic] a calm, routine performance of duty by the officers. There is no evidence of any threats on the part of the officers or the use of any other means from which duress or coercion could be inferred." *Id.* at 620.

Alcala's expression of consent was specific, unequivocal, and affirmative. It was more than assent, it was an invitation. The atmosphere was not coercive but "congenial." *People v. Bustamonte*, 270 Cal.App.

<sup>1</sup>This line of reasoning seems to have led federal courts to distrust and disfavor consensual searches. "One may question a logic which fails to consider that aspect of human nature which leads one person to believe he may bluff or beguile another." *People v. Linke*, 265 Cal.App.2d 297, 306, 71 Cal.Rptr. 371, 376 (1968).

2d 648, at 652, 76 Cal.Rptr. at 20 (1969). Alcala's subsequent assistance during the search confirms the voluntary nature of his consent.<sup>2</sup>

The state trial and appellate courts correctly concluded that Alcala was not overawed by the badge and that his consent was free and voluntary. The Ninth Circuit should have respected that finding.

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## II

### CLAIMS RELATING TO SEARCH AND SEIZURE SHOULD NOT BE AVAILABLE TO STATE PRISONERS ON FEDERAL HABEAS CORPUS

Implicit in the decision of the court below is the proposition that Fourth Amendment claims can be raised on federal habeas corpus by state prisoners, a proposition as to which a five-member majority of the Court declared there is "no doubt." *Kaufman v. United States*, 394 U.S. 217, 225 (1969). We seek to raise such doubts and invite the Court to reconsider that proposition. It is true that previous decisions of this Court have made federal habeas corpus available to state prisoners to assert the exclusionary rule as a ground of setting aside their convictions. See *Harris v. Nelson*, 394 U.S. 286 (1969); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967); see also *Whiteley v. Warden*, 401 U.S. 560 (1971). But, as pointed out by Justice Black in his dissent, in the *Kaufman* case, this Court has never anticated

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<sup>2</sup>Gonzales testified that Alcala opened the trunk.

a clear reason for this rule. *Id.* at 239. The attempted justification of the majority opinion, *i.e.*, "The availability of post conviction relief [for Fourth Amendment claims] serves significantly to secure the integrity of proceedings at or before trial and on appeal" (*Id.*, at 229) is unpersuasive, because it fails to assess the reasons for the exclusionary rule and weigh them against the disadvantages involved in raising that rule on collateral attack. We request the Court to undertake such an analysis here.

It is unanimously accepted by both proponents and critics of the exclusionary rule that its purpose is not to vindicate the interest of an individual defendant but rather to promote the public interest by deterring unreasonable searches. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914); *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955); *cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971), dissenting opinion of Burger, C. J.; *Kaufman v. United States*, *supra*, 394 U.S. 217, 231 (1969), dissenting opinion of Black, J. Thus, any real assessment of the question of whether the exclusionary rule should be available on collateral attack requires weighing the deterrent effect of the exclusionary rule against the substantial detriment to the public interest involved in undermining the finality of criminal judgments.

Whatever deterrent value the exclusionary rule may have in criminal trials and on direct appeals, itself an uncertain question (see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 [1971], dissenting

opinion of Burger, C. J.; Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. Rev. 665 [1970], it seems clear that such deterrence is attenuated after a judgment has become final. The point was simply and cogently put by Professor Anthony Amsterdam in his law review article entitled, *Search, Seizure and Section 2255*, 112 U. Pa. L. Rev. 378, in which he states as follows:

"In every litigation in which exclusion is in issue, a strong public interest in deterring official illegality is balanced against a strong public interest in convicting the guilty. [Footnote.] As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance. The courts apparently have recognized this; the foggy doctrines of 'standing' [footnote] and 'attenuation of taint' [footnote] appear responsive to it. . . . But if there is one class of cases that I would hazard to say is very probably beyond the point of diminishing returns, it is the class of search and seizure claims raised collaterally." *Id.* at 389-390, footnotes omitted.<sup>3</sup>

On the other side of the balance, the public interest in the finality of criminal judgments is substantial. To reopen for evidentiary hearing a criminal conviction

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<sup>3</sup>Professor Amsterdam limited his article to collateral review of federal convictions, and in the course thereof stated, "it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim." *Id.* at 380. However, despite any attempted qualification, the essential thrust of Professor Amsterdam's reasoning applies with equal force to assertion of the exclusionary rule as a ground for federal collateral attack on state convictions.

long final, as the Ninth Circuit has done here, can only further erode public confidence in the administration of criminal justice, tend to demoralize state trial and appellate judges, and, most important, sap the criminal law of its deterrent effect by clouding the certainty of punishment even after a judgment has been affirmed on appeal. Moreover, it is totally at odds with any notion of rehabilitating criminal offenders. "The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." Bator, *Finality in Criminal Law and Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963).

We commend to the Court the analysis of former California Chief Justice Roger Traynor, who put the matter thusly:

"The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement. [Citations.] That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." *In re Sterling*, 63 Cal.2d 486, 487-488, 47 Cal.Rptr. 205, 207, 407 P.2d 5, 7 (1965), quoting *In re Harris*, 56 Cal.2d 879, 883-884, 16 Cal.Rptr. 889, 892, 366 P.2d 305, 308 (1961).

This Court should re-examine *Kaufman* and hold that the exclusionary rule may not be raised on collateral attack.

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### CONCLUSION

We respectfully request the Court to grant a writ of certiorari and reverse the decision of the Court of Appeals.

Dated, San Francisco, California,  
November 30, 1971.

EVELLE J. YOUNGER,

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(Appendices Follow)



## Appendix A

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### United States Court of Appeals for the Ninth Circuit

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Robert Bustamonte,	} No. 25,678
vs.	
Merle R. Schneckloth, Superintendent, California Conservation Center,	
Defendant-Appellee.	
Plaintiff-Appellant,	

[September 13, 1971]

On Appeal from the United States District Court  
for the Northern District of California

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Before: HAMLIN, MERRILL and ELY, Circuit  
Judges

MERRILL, Circuit Judge:

This appeal is taken from an order of the District Court denying without hearing appellant's petition for a writ of habeas corpus.

On April 21, 1967, appellant was convicted in the California Superior Court for Santa Clara County of a violation of California Penal Code §475(a): possession of a completed check with intent to defraud. Judgment was affirmed on appeal to the California District Court of Appeal. *People v. Bustamonte*, 270

Cal.App.2d 648 (1969). Hearing was denied by the State Supreme Court.

In his petition for habeas corpus Bustamonte asserts that his state conviction resulted from a refusal of the state trial court to suppress evidence obtained as the result of an unlawful search and seizure.

In January, 1967, the proprietor of a carwash in Mountain View discovered that his business office had been broken into and that a check protector and a number of blank checks had been stolen. Later that month a Ford car with six occupants, one of whom was appellant, was stopped by a Sunnyvale police officer at approximately 2:40 A.M. The officer had noticed that a headlight and the license-plate light were burned out. He asked the driver for his license. When the driver failed to produce one the officer asked the other occupants for identification. Only Joe Alcala, who stated he had borrowed the car from his brother, produced a driver's license. After further discussion the officer asked the six occupants to step out. A traffic citation was issued for the defective lights, as well as for the driver's failure to produce a license. After being joined by another officer, the first officer then questioned each of the occupants. A third police car arrived. The first officer then asked Alcala if he could search the car, and Alcala consented. Alcala was not advised that he had the right to refuse to consent, nor are we referred to any indication in the record that he had knowledge of such right. Three checks of the carwash were found wadded up under the left rear seat. Each was signed in the name of the owner

of the carwash and was filled in by resort to a check protector. On the basis of statements later obtained from the driver of the car, a warrant was obtained for the search of two other cars. These searches resulted in the seizure of the check protector and several blank checks.

The principal contention made on this appeal is that the state trial court erred in refusing to suppress the evidence obtained in the search of the Ford. The state courts proceeded on the theory that the search had been consented to and was therefore lawful. Appellant takes issue with this determination on the ground that the Government has failed to demonstrate that the consent was given with knowledge that it could be withheld.

At the time of the search there was no probable cause to believe that the car contained anything that could properly be seized. The search, thus, was one from which Alcala had a constitutional right to be free.<sup>1</sup> Any consent to the search, then, amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for constitutional waiver.

These have been discussed by this court in *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965), and *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968).

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<sup>1</sup>The other occupants of the car also have standing to assert Alcala's right. *Jones v. United States*, 362 U.S. 257 (1960); compare *Cotton v. United States*, 371 F.2d 385, 390-91 (9th Cir. 1967), with *Diaz-Rosendo v. United States*, 357 F.2d 124, 132 (9th Cir. 1966) (*en banc*).

" \* \* \* a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld \* \* \*." *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965).<sup>2</sup>

From the record before us it is not clear that the California courts have made an adequate finding of the necessary understanding. With reference to Bustamonte's knowledge, the California Court of Appeal, *People v. Bustamonte*, 270 Cal.App.2d at 653, stated:

"The basic premise behind the California rule was stated in *People v. MacIntosh* [264 A.C.A. 834] at page 838: 'When permission is sought from a person of ordinary intelligence the very fact that consent is given \* \* \* carries the implication that the alternative of a refusal existed.' "

It would appear that the California courts, in addition to finding that the atmosphere was not coercive, have relied entirely on the verbal expression of assent. They have reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent. Yet, as we have noted, mere

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<sup>2</sup>We find nothing in the Supreme Court's opinion in *Bumper v. North Carolina*, 391 U.S. 543 (1968), to cast doubt on the continued vitality or breadth of these principles. On the contrary, *Bumper*, although not concerned with the issue before us now, expressly approved a number of lower court opinions which had required that waiver of Fourth Amendment rights be both uncoerced and intelligent.

verbal assent is not enough. Further, in our view, the "implication" apparently relied upon by the California courts can hardly suffice as a general rule. Under many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.

We conclude that the District Court should direct its attention to the issue of the existence of such knowledge as is required under *Cipres* and *Schoepflin*. If it concludes that no adequate and acceptable state court finding has been made upon this issue, then it should make its own finding, conducting a hearing if necessary to develop the facts.

We find no error in the District Court's rulings with respect to other grounds asserted in the petition.

The District Court order denying writ is vacated and the matter is remanded for further proceedings.

**Appendix B**

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United States District Court  
for the Northern District of California

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C-70 303

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Robert Clyde Bustamonte,	}
vs.	
Merle R. Schneckloth, Superintendent, California Conservation Center,	
Respondent.	

**ORDER GRANTING MOTION TO FILE IN  
FORMA PAUPERIS AND DENYING  
PETITION FOR WRIT OF HABEAS CORPUS.**

Petitioner alleges that the search of two automobiles which produced the checks in question was unconstitutional. He argues that the affidavit supporting the search warrant was defective in that the informant was not proven to be reliable, and there were no underlying facts to allow the magistrate to make an independent judgment. As the California Court of Appeals decision points out, the situation in which the informant was found lent credence to his reliability. Regarding the element of underlying facts, this was satisfied by the corroboration of the informant's

facts. *People v. Bustamonte*, 270 A.C.A. 707, 714-15 (1969).

Petitioner's claim that there was no consent to the search is unsubstantiated.

Petitioner's third claim is that the trial court erred in allowing the policeman to testify that the petitioner said in response to *Miranda* warnings, "I don't care to say anything." This error does not, in view of the circumstances, meet the constitutional test of prejudicial error. *See Chapman v. California*, 386 U.S. 18 (1967).

It Is Hereby Ordered that the petition for a writ of habeas corpus be denied.

Dated: February 6, 1970.

Alfonso J. Zirpoli,  
United States District Judge